

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JOHN DOE,)
Plaintiff,)
)
vs.) CIVIL CASE NO. 22-0872-PX
)
THE UNIVERSITY OF MARYLAND)
COLLEGE PARK, MARYLAND,)
et al,)
Defendants.)
_____)

Tuesday, March 28, 2023
Courtroom 2C
Greenbelt, Maryland

MOTIONS HEARING

BEFORE: THE HONORABLE PAULA XINIS, Judge

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Computer-Aided Transcription of Stenotype Notes

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1 (Appearances Continued)

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1 **(Proceeding commenced at 1:01 p.m.)**

2 **THE DEPUTY CLERK:** The matter now pending before this
3 Court is Civil Number PX-22-0872, Doe v. The University of
4 Maryland College Park, Maryland, et al. We're here today for
5 the purpose of a motions hearing. Counsel, please introduce
6 yourselves for the record, beginning with the plaintiff.

7 **MR. NORTH:** Good morning, Your Honor. Benjamin
8 North for the plaintiff and I'm here with my co-counsel, Amy
9 Bradley.

10 **MS. BRADLEY:** Good afternoon, Your Honor.

11 **THE COURT:** Good afternoon.

12 **MS. SHERIDAN:** Good afternoon, Your Honor. Ann
13 Sheridan, Assistant Attorney General representing University
14 of Maryland, College Park and defendants, Grace Karmiol and
15 Angela Nastase. Ms. Nastase is here with me as well.

16 **THE COURT:** Okay, good afternoon.

17 **MS. SHERIDAN:** Good afternoon.

18 **MR. BEASLEY:** Good afternoon, Your Honor. Ben
19 Beasley on behalf of defendant number three. Last name
20 B-e-a-s-l-e-y.

21 **THE COURT:** Thank you.

22 **MR. CONDLIFF:** Good afternoon, Your Honor. Jack
23 Condliff on behalf of defendant number two who is seated to my
24 right.

25 **THE COURT:** Okay, good afternoon to all of you.

1 All right, so pending before the Court are two motions:
2 The first is the University's Motion to Dismiss at ECF 52 and
3 the second is defendant number two's Motion for Summary
4 Judgment at ECF 58.

5 Let me just say in advance, I really appreciate your time
6 today. I have a lot of questions. This is a very, very
7 difficult case and very important case.

8 And so with that, let me start with the University and
9 your argument. Ms. Sheridan, you can either stay seated or
10 move to the podium. It's up to you, but please speak very
11 clearly into the microphone so I can hear you.

12 **MS. SHERIDAN:** Thank you, Your Honor. I would like
13 to go to the podium, if that's okay.

14 **THE COURT:** Sure.

15 **MS. SHERIDAN:** Thank you, Your Honor. We have moved
16 to dismiss based on 12(b)(6) for failure to state a claim
17 because John Doe is urging this Court to impose on the
18 University a new type of Title IX liability not previously
19 recognized by any Court. Mr. Doe's theory represents an
20 extension of Title IX liability not contemplated by the
21 University when it's accepted Title IX funds. And I see the
22 Court's puzzled look and I'll explain why this is.

23 **THE COURT:** No, I think I know why you say that. I
24 mean, your pleadings push very hard on the Court's rationale
25 in *Nungesser*. And it seems as if the University is wrapping

1 itself in that decision in terms of if I allow this claim to
2 go forward to discovery here, then any exonerated person
3 accused of rape suddenly has a cause of action. That was
4 stated more than once I think in the pleadings and I think
5 that's what you mean, but tell me if I'm wrong.

6 **MS. SHERIDAN:** Well, that is what I mean. I guess I
7 want to start by saying, I mean, what's different here is that
8 typically when a respondent is challenging what the University
9 has done with respect to Title IX, it's about the process. And
10 here there's no question that Mr. Doe received a fair process
11 that was not -- I mean, it resulted in his favor. He cannot
12 have any complaints about that. But at the conclusion of the
13 process, he is now indicating that the University's
14 obligations to him under Title IX extend to silencing his
15 accuser and her supporters. But the Department of Education
16 regulation --

17 **THE COURT:** Is that what the complaint really says?
18 I mean, isn't the complaint saying -- it pleads all of the
19 fact-specific circumstances surrounding the underlying Title
20 IX hearing and process of which I think it's fair to impute it
21 all to the University. You knew it, it's your process, right?
22 I'm not sure yet even how much it necessarily matters other
23 than what we learn from it, is this all arose from a sexual
24 encounter between a woman and a man. The woman accused the man
25 of rape. It went to a hearing. He was exonerated. Then that

1 same woman in association with a student association that is
2 alleged to be very close to the university's Title IX
3 office -- because it's not just the complainant, the person
4 who says she was raped. It's also the two leaders of the PSA
5 who then take the next step to say, "John Doe is a rapist.
6 John Doe is still on campus under investigation." And that
7 was directed at an organization to which John Doe has belonged
8 for a long, long time.

9 And John Doe is not asking for the University to silence
10 that. John Doe is alleging that the University had very
11 specific complaints made and did -- not only did nothing, but
12 in the interactions with John Doe essentially said, "Well the
13 complainant made those allegations in good faith and she
14 perceived John Doe as a perpetrator of a sexual offense
15 against her." I mean, that was -- according to the complaint,
16 that was your agent's words.

17 So the Title IX office at that time, they're in it.
18 They're in the middle of this. But they're not asked to
19 silence anybody, they're just asked to investigate a
20 complaint.

21 **MS. SHERIDAN:** Well, they were asked to treat this
22 as a complaint regarding sexual harassment. And it did not
23 meet the definition of sexual harassment. I mean, as a
24 preliminary matter --

25 **THE COURT:** Why is it not based on sex?

1 **MS. SHERIDAN:** Well, before we even get to sex, I
2 don't think you can even characterize it as harassment because
3 it wasn't directed at Mr. Doe. This is speech that one group
4 of students --

5 **THE COURT:** It says John Doe -- wait, let's go in
6 order, okay? You make these arguments in order and I would
7 really like to do it in order because again, this is so
8 important to you, to the University, to Mr. Doe, to the
9 complainants, to the good people who are here.

10 **MS. SHERIDAN:** I agree.

11 **THE COURT:** I'm not interested in making a mistake
12 of law or fact, frankly. And I think the problem with a lot of
13 these cases is that they come on a Motion to Dismiss and
14 motions sometimes get the best of folks. And it is written in
15 a way that is not as careful as we need to be in these
16 circumstances. So I'm really trying hard to be very careful in
17 my words and I'd like to go through this with you in the order
18 in which you raise it, if that's okay, so that I understand
19 fully your arguments.

20 **MS. SHERIDAN:** Yes, Your Honor.

21 **THE COURT:** Okay.

22 **MS. SHERIDAN:** I mean, as far as the initial prong
23 is whether it constitutes sexual harassment.

24 **THE COURT:** Correct, yes.

25 **MS. SHERIDAN:** And as an initial matter, it's not at

1 all clear that this is harassment as defined by the Department
2 of Education. I mean, harassment as defined by the Department
3 of Education regs is unwelcome conduct of a sexual nature.
4 Unwelcome -- which typically is unwelcome sexual advances,
5 requests for sexual favors.

6 **THE COURT:** Right. But *Jennings* in the Fourth
7 Circuit says, "Sexual harassment occurs when the victim is
8 subjected to sex-specific language that is aimed to
9 humiliate." And then there's other words, "humiliate,
10 degradate." So --

11 **MS SHERIDAN:** And certainly that's true with respect
12 to not only with *Jennings*, but *Feminist Majority*. But in
13 those cases, the speech was directed at the plaintiff.

14 **THE COURT:** But here the speech is directed at the
15 plaintiff. "John Doe is a rapist" -- to his club, to the club
16 that he belonged.

17 **MS. SHERIDAN:** It was directed to third parties.
18 Okay, I see the Court's not buying that. Okay.

19 **THE COURT:** I'm confused.

20 **MS. SHERIDAN:** But the harassment is basically, "I'm
21 threatening you. I'm calling you names to your face." It's
22 not that I'm telling rumors about you to somebody else. I
23 mean, that's -- harassment is conduct speech directed at you.
24 Threats made against you.

25 **THE COURT:** So if I threaten -- if I threaten you

1 through someone else, it's not harassment? If I say, "You are
2 a rapist" and the consequences of that is that the third-party
3 takes adverse action against you in a manner designed to
4 humiliate or degrade the person, that's not actionable?

5 **MS. SHERIDAN:** Well, it might be actionable. I don't
6 know if it's actionable under Title IX. But let me move onto
7 whether it's sex-based or not.

8 **THE COURT:** Yeah, that's where I thought you were
9 really living in your pleadings.

10 **MS. SHERIDAN:** What's really important here is, I
11 mean, first of all, "rapist" is not a gender term. Although
12 the traditional definition of rape involves penetration of a
13 vagina by a penis, modern definitions of rape have been
14 expanded so that a woman can be a rapist. A man can be a rape
15 victim. So the use of that term in and of itself does not
16 make it sexual harassment.

17 **THE COURT:** And I agree with you. I don't think as
18 in the plaintiff in *Nungesser* maybe overstated the claim and
19 it caused, I think, the Court to have to perhaps wrestle with
20 the concept that it's not necessary. It's not necessary to
21 find that the term "rapist" is inherently gendered. Because
22 this is all very fact-bound and the facts of this case are
23 that it arose -- the accusations, the hearing, it arose out of
24 a sexual encounter between a man and a woman in that context
25 where the woman said it was rape. And there was a whole

1 hearing about it in which the accused was exonerated according
2 to the complaint, right? And now stemming from that there's
3 not just calling him a rapist, but a series of events that
4 take place. And the argument isn't being made that it's
5 inherently gendered, but rather that in this context it is, in
6 part, because Doe is named. That's how I'm reading it.

7 **MS. SHERIDAN:** Right. And I don't see any specific
8 facts supporting that allegation that it was because he was
9 male as opposed to because he was a respondent.

10 **THE COURT:** Are you saying there are no allegations?
11 There's nothing in the complaint from which I can draw --

12 **MS. SHERIDAN:** There are only conclusory allegations
13 saying that. But there's no -- there's no allegations
14 regarding anybody's statements to anybody from which you can
15 draw that conclusion. It's really just speculative.

16 **THE COURT:** How about the conversation that took
17 place toward -- there's the point at which Jane Roe was put on
18 the executive committee of the PSA. She announces it on social
19 media in February of 2022. She says that she was raped by two
20 boys. And in the same media event she says no girl needs to
21 wake up with her pants undone. That prompts another complaint
22 by Mr. Roe in which he alleges to have a conversation with Ms.
23 Nastase in which Ms. Nastase then says she perceived Doe as a
24 perpetrator of a sexual offense against Roe.

25 So all of this is very wrapped up in each other. It is

1 not just about a rape, it's a girl and a boy and this woman
2 accusing this man of rape.

3 And here's my question to you: When the table is turned
4 and we have other cases in which a woman makes a complaint and
5 then there are allegations of similar disparaging, insulting,
6 humiliating comments, we don't go through this attempt to
7 parse out what part of it is because the complainant is a
8 woman, the plaintiff is a woman and what part of it is because
9 she is complaining about rape. And I'm thinking about *East*
10 *Haven*, I'm thinking about *Rouse*, right? I mean, we're going
11 through this analysis here to try to disaggregate them and I'm
12 not sure why.

13 **MS. SHERIDAN:** Your Honor, in those instances, those
14 cases that Your Honor is referring to, it was clear that the
15 harassment, the conduct that was complained about was in
16 response to the person making the report. You know, so the
17 person makes -- the woman makes a report of a sexual assault
18 that she was raped and then there's direct retaliation. And
19 those cases it was never -- it was never argued that, you
20 know, that it was anything other than retaliation.

21 Here, there's no link between the speech that occurred
22 here and his defense of himself in the Title IX proceeding.

23 **THE COURT:** Why isn't that plausible from the
24 complaint? The complaint lays out this protracted evidentiary
25 hearing where he had to defend himself against -- at least

1 according to the complaint -- allegations ultimately proven
2 false that went on for months. And that as soon as that's
3 over, the allegations that form the subject of the Title IX
4 claim begin.

5 **MS. SHERIDAN:** Well, I mean, temporal proximity may
6 be an appropriate --

7 **THE COURT:** But it's subject matter proximity too. I
8 mean, it's the same parties. It's the same sexual encounter.
9 It's the same --

10 **MS. SHERIDAN:** I think what Your Honor is suggesting
11 is that any time, any time a claimant loses a Title IX process
12 and continues to engage in speech, that it's a Title IX issue.

13 **THE COURT:** I am not. And that's why we're having
14 this conversation today because I want to be crystal clear
15 about what I'm saying and what I am not saying. I'm pushing
16 back because I think you are disaggregating the facts. And at
17 the Motion to Dismiss stage, I don't believe that that is
18 proper. If I deny your motion, it is not a floodgates moment
19 by any stretch, because these facts are one, it's inherently
20 fact-bound. Two, these facts are not any facts. Every case
21 comes to the Court on its own legs. And what I don't want to
22 have happen is by deciding this in a Motion to Dismiss, we end
23 up setting law that is really not on all fours with where we
24 should be.

25 And I'm talking about *Nungesser*. I disagree with

1 *Nungesser*. I think that it sets up this dichotomist variable
2 that does not exist in the law. It is not one motive or
3 another. And in *Nungesser*, the problem that I have with
4 *Nungesser* is the Court found that the only allegation that was
5 made plausible is that it was a -- the subsequent allegations
6 made to *Nungesser* were based on a personal vendetta. And it
7 was personal animus, not arising from any sort of sex-based
8 motivation.

9 And the problem that I have with that is I don't think I
10 have to pick one or the other. If the facts make plausible
11 that it's more than one or both and it's a very fact-bound
12 analysis, then I have to stay with the facts here. And so I'm
13 really going to push back if you say "Well, Judge, if you deny
14 dismissal here, that means, you know, anyone who is exonerated
15 now has a claim." No.

16 **MS. SHERIDAN:** I think, Your Honor, that
17 universities already have difficulty as it is navigating Title
18 IX. And I think that they are ill-equipped to adjudicate
19 defamation claims. And that is exactly what the Court is
20 asking them to do.

21 **THE COURT:** Can I ask you a question about that?
22 Can I ask you about that? What's the University policy on
23 conduct, including words and actions taken against a person
24 who is accused of sexual misconduct? What is your policy on
25 that? So the process just hypothetically I just want to

1 understand the contours. The process is going on. One student
2 makes allegations against another. Title IX office gets
3 involved. There is an investigation and a hearing and no
4 decision has been made yet. In that first phase, what is the
5 University's policy on how other students may or may not
6 behave toward the accused?

7 **MS. SHERIDAN:** Well, first of all the process itself
8 is protected under FERPA. It's not -- it's not a process
9 that's, you know, that is broadcast to everybody on campus. I
10 mean --

11 **THE COURT:** I know. I get that. Let me try to make
12 it even simpler. The accuser, the complainant starts spreading
13 the word to the PSA and to other organizations in which the
14 accused belongs. "He's my rapist." "He raped me." And the
15 process is still going on.

16 **MS. SHERIDAN:** In order to interfere with the
17 process.

18 **THE COURT:** Well, I don't know. That's what the
19 person does. What is the University's policy in that regard?
20 Do you take any action against the accuser? That's phase 1.
21 And then phase 2 is what policy do you have once the case is
22 adjudicated? If the case is adjudicated one way or another,
23 do you have any sort of policy on what individuals involved in
24 that process can and cannot do?

25 **MS. SHERIDAN:** May I confer with my --

1 **THE COURT:** Sure, of course.

2 **MS. SHERIDAN:** So unfortunately, the Department of
3 Education regulations and our policy which mirrors that
4 basically provide that the exercise of rights protected under
5 the First Amendment do not constitute retaliation under Title
6 IX. So the University is not in a position to regulate speech.

7 **THE COURT:** But you didn't make that argument in
8 your pleadings.

9 **MS. SHERIDAN:** Sorry?

10 **THE COURT:** You didn't make that argument in the
11 pleadings, right?

12 **MS. SHERIDAN:** Your Honor, we did cite to that reg
13 in our reply.

14 **THE COURT:** See, what I'm trying to get at is assume
15 for a moment it's not protected speech and it involves
16 allegations of --

17 **MS. SHERIDAN:** But Your Honor, that's the rug is
18 assume -- because the University -- you're putting the
19 University in a position of determining whether something is
20 protected speech or not. They're not First Amendment experts.
21 They are not in a position to figure out who has privilege to
22 say what and to do that type of adjudication. That's for
23 courts to do.

24 **THE COURT:** But then why didn't you make that
25 argument in your motion, in your first motion when the

1 plaintiff is alleging on four or five separate occasions, "I
2 went to the office, the Title IX office. I told them that the
3 accuser was now saying, 'I'm her rapist' and going to my clubs
4 and then my club is now kicking me off," right? Why isn't
5 argument there --

6 **MS. SHERIDAN:** I'm sorry, I thought I was making
7 that argument and it certainly was not explicit enough.

8 **THE COURT:** Well, what page is it on? Because I
9 literally -- we have gone through your argument, like that's
10 why I wanted to do this step by step because I wanted to know
11 exactly where the University stood on this and I didn't see a
12 First Amendment argument.

13 **MS. SHERIDAN:** I mean, that's essentially the -- you
14 know, that's what our reliance on *Nungesser* was and I'm sorry
15 if we did not --

16 **THE COURT:** *Nungesser* isn't a First Amendment
17 argument, though. It's the argument in *Nungesser* is this isn't
18 sex-based. It was a personal vendetta. It was personal animus
19 and personal animus is not protected. It's not sex-based
20 conduct. That was *Nungesser*. So now you're throwing at me the
21 First Amendment and I'm just trying to figure out what's the
22 baseline University policy when you've got --

23 **MS. SHERIDAN:** We can't regulate speech in that way.
24 I mean, we can regulate -- we can try to issue some type of --
25 something to the Office of Student Conduct if there is conduct

1 that's threatening or trying to keep somebody from
2 participating in the process.

3 **THE COURT:** Yeah, I mean, I was just about to ask
4 you, we can think of all kinds of speech that's really
5 offensive and humiliating and degrading.

6 **MS. SHERIDAN:** True.

7 **THE COURT:** And if it were a man saying it to a
8 woman your argument would not be, "We can't get involved
9 because it's speech." Right? I mean, if a student comes and
10 says "Listen, my professor is making all kinds of comments
11 about my parts and about what" -- you know, just take
12 *Jennings*. Take the facts in *Jennings*. All that coach did was
13 talk.

14 **MS. SHERIDAN:** I know, but here's the difference
15 between *Jennings* and this case: *Jennings* involved a coach and
16 it involved somebody who was part of the University. He was
17 somebody over whom the University had an employment
18 relationship. It's a much -- I mean, that -- *Davis, Davis*
19 actually exhibits a much higher, more stringent standard for
20 deliberate indifference to student-on-student conduct.

21 **THE COURT:** So you're saying if it were a student
22 who made all those comments and persisted in those comments
23 and the student who was getting the comments comes to the
24 office and says, "He keeps saying, you know, awful things
25 about my body and about my parts and asking all of these

1 intimate questions." Your position is, we can't get involved?

2 **MS. SHERIDAN:** No, no, no. That's not my position
3 at all. But I think that there's a difference between whether
4 something permits a Title IX response versus whether something
5 constitutes deliberate indifference. And I think if you look
6 at what occurred here and you look at the timeline of actually
7 what is alleged, I mean, it's alleged that the Title IX
8 process concluded in September in Mr. Doe's favor. A few weeks
9 later, Mr. Doe -- Ms. Roe's friends told the lacrosse team
10 president that he was a rapist under investigation. And the
11 team cancelled a party scheduled to occur at his apartment.

12 And then in December, Defendants 2 and 3, again, told the
13 lacrosse team's president, "Doe was a rapist under
14 investigation" and Mr. Doe was prohibited from attending a
15 lacrosse team event that month.

16 **THE COURT:** Okay.

17 **MS. SHERIDAN:** At that point he files a formal Title
18 IX complaint. I mean, you know, this is not the type of --
19 first of all, it's not clearly gendered and it's not clearly
20 retaliatory. It's not the type of conduct that does require a
21 Title IX response. I mean --

22 **THE COURT:** But did you respond? I mean, part of
23 what is a little bit tricky here is you're picking out some
24 facts.

25 **MS. SHERIDAN:** Well, I'm picking out the only facts

1 that are specified in the complaint, because there's a lot of
2 conclusory facts in there.

3 **THE COURT:** No, there's actually -- there is a
4 timeline that is pleaded and I'm sure the plaintiff will walk
5 me through it if I don't walk it through with you, but that
6 September, the hearing was concluded. By October, Mr. Doe is
7 complaining. Then --

8 **MS. SHERIDAN:** That's not clear from --

9 **THE COURT:** That first complaint is in December,
10 right? Where defendant Karmioli gets involved. She is in the
11 Title IX office. She hears the complaint. She does not say it
12 doesn't belong here or we can't do anything. Defendant Karmioli
13 says she'll instruct PSA to stop harassing Doe. That's what
14 paragraph 84 says. Then she says she needs -- she will also do
15 it protecting Doe's name, right? And then decides that -- and
16 understood and agreed why she won't use his name and then
17 decides that she can't do that and communicates that to him.

18 So again, in the light most favorable to the plaintiff,
19 today you're saying that Title IX, the office has no business
20 in this. This is protected speech and you shouldn't even be
21 involved. But the complaint says you were involved. Your
22 people actively participated in the complaints and they went
23 from October to December and then we have January and then
24 February.

25 **MS. SHERIDAN:** Well, I mean, we can stay involved to

1 the extent that we can refer them to other supportive
2 services. Like the complaint alleged that Ms. Nastase did in
3 May when there was an encounter between Mr. Doe and Ms. Roe
4 and her boyfriend and where he was threatened. I mean, the
5 complaint alleges that Ms. Nastase properly referred that to
6 Office of Student Conduct to see whether there had been a
7 violation of the no contact order that was in place between
8 the parties. And so the Title IX office can get involved in
9 that way. It doesn't mean that it triggers a Title IX
10 investigation, a full-fledged investigation.

11 **THE COURT:** I understand that, but this is in
12 response to you picking certain facts out and saying there's
13 no deliberate indifference, right? I mean, that's the
14 conversation that we were on.

15 **MS. SHERIDAN:** Yeah.

16 **THE COURT:** And here there's -- there are facts pled
17 that there was actual knowledge of what Mr. Doe perceived as
18 the retaliatory and harassing conduct.

19 **MS. SHERIDAN:** But Your Honor, that's where I think
20 that you're reading into the complaint because I don't see any
21 link linking it to retaliation. It's not --

22 **THE COURT:** Well then you're moving on to
23 retaliation. I want to stay with the harassment just for a
24 moment. I want to understand your argument with regard to
25 harassment. Your first order of argument is he was not subject

1 to sexual harassment because it just doesn't meet the
2 definition. And you rely on *Nungesser* for that. Then you say,
3 it wasn't severe and pervasive. Then you say, no facts support
4 deliberate indifference, just on the harassment before we move
5 to retaliation.

6 **MS. SHERIDAN:** Okay.

7 **THE COURT:** So on deliberate indifference, why
8 aren't the number of times that Mr. Doe went and made a
9 complaint -- if I accept that it's sexual harassment just for
10 the purpose of this argument and he complains about it to the
11 Title IX office on the numerous occasions that are in the
12 complaint, why wouldn't that be enough of actual knowledge
13 coupled with the decision not to do anything about it --

14 **MS. SHERIDAN:** Is it something that was clearly
15 sexual harassment, though? I mean, I think that there's --
16 that Title IX officials have to be given the breathing room to
17 make these close calls in gray areas. And I don't think that
18 *the Davis* court ever expected that those decisions would be
19 turned over to a jury to second guess.

20 **THE COURT:** But why then in *Feminist Majority* was
21 that enough?

22 **MS. SHERIDAN:** Because in *Feminist Majority* there
23 was no question but that it was sex-based and it was
24 retaliatory. That was not argued.

25 **THE COURT:** But that was different, though. I mean,

1 it wasn't argued and the Fourth Circuit was like, of course it
2 is because --

3 **MS. SHERIDAN:** Well, it clearly was, but it wasn't
4 based on the gender dynamics. It was based on these women made
5 a report to the administration.

6 **THE COURT:** Right.

7 **MS. SHERIDAN:** About the men's conduct fostering
8 sexual assaults, increased sexual assaults on campus. And in
9 response, in direct response to those complaints and to
10 raising these issues to everybody's attention, they were
11 subjected to over 700 direct threats of graphic sexual
12 violence. That's a very different situation than this one.

13 **THE COURT:** But is it because in number or is it --

14 **MS. SHERIDAN:** It's not only in number, it's because
15 the intent was so evident. The intent was to shut them down,
16 to stop them from speaking.

17 **THE COURT:** And here --

18 **MS. SHERIDAN:** And here --

19 **THE COURT:** --what is pleaded is the intent was to
20 get him off campus; to rid the campus of predators and to get
21 him off of at least with regard to the lacrosse team. I mean,
22 sure, it's not nearly as --

23 **MS. SHERIDAN:** Right, but also as -- I mean, the
24 genesis of these complaints is his conduct, not because he
25 defended himself. I mean, regardless of how --

1 **THE COURT:** How do you separate that out? You just
2 said the genesis of all this is his conduct.

3 **MS. SHERIDAN:** Yes.

4 **THE COURT:** What conduct are you speaking of?

5 **MS. SHERIDAN:** I mean, he definitely had a sexual
6 encounter with this woman and she -- he believes it was
7 consensual and she believes it wasn't.

8 **THE COURT:** Okay. And a finder of fact after a
9 hearing process that you as the University give him, concluded
10 that --

11 **MS. SHERIDAN:** --that his version was more
12 believable than hers. That was one.

13 **THE COURT:** It all stems from a sexual encounter,
14 right? So now why when there's subsequent activity based on
15 not only the sexual encounter but the process, why is it now
16 suddenly devoid of any sex-based intent? You wouldn't be
17 saying that when Ms. Roe accused Mr. Doe of rape, that that
18 wasn't sex-based, right?

19 **MS. SHERIDAN:** When she accused him of rape was that
20 sex-based?

21 **THE COURT:** Yeah, was it -- if the University --

22 **MS. SHERIDAN:** She was accusing him of rape not
23 because he was a man, she was accusing him of rape because of
24 the conduct.

25 **THE COURT:** Okay.

1 **MS. SHERIDAN:** So he's not being targeted because of
2 his gender. He's being targeted because of the perceived
3 conduct. That's how Ms. Roe perceived the encounter. And, you
4 know, somebody could go to a Title IX process and be very --
5 it doesn't mean that it didn't happen. It doesn't mean that
6 she wasn't raped.

7 **THE COURT:** I understand that and I'm not suggesting
8 that. You see, this is why this case is so important because
9 emotions run incredibly high for everybody involved. And I'm
10 trying to take that out of it and really understand the
11 analysis here.

12 **MS. SHERIDAN:** I think the Court is really putting
13 the University in a difficult position if we're going to have
14 to regulate speech following the process.

15 **THE COURT:** Well let me ask you this then: Doesn't
16 it make sense if that's the argument, to make the argument
17 square on in the pleadings?

18 **MS. SHERIDAN:** I should have, Your Honor. I should
19 have.

20 **THE COURT:** Yes, that's one. And two, if we're
21 really going to do this issue justice for the University --

22 **MS. SHERIDAN:** Yes.

23 **THE COURT:** --as well as all of the students, right
24 now I've got to tell you, it's my firm view I need some
25 discovery. I'm not -- and I do not want to write on this

1 assuming facts that are not developed, that may not be
2 accurate, that don't really squarely address the University's
3 primarily concern about why this case is outside of the Title
4 IX context, right? That's a very, very vexing place for a
5 Court to be because as we see, cases that were written ten
6 years ago or five years ago don't seem to square with the
7 jurisprudence now. And often in a Motion to Dismiss stage,
8 that's when the mistakes happen, if that makes sense.

9 **MS. SHERIDAN:** That does make sense to me, Your
10 Honor. So if I could shift gears slightly --

11 **THE COURT:** Sure.

12 **MS. SHERIDAN:** --to the *Cummings* argument which is
13 that the complaint hasn't alleged anything here other than
14 emotional distress damages. It hasn't alleged --

15 **THE COURT:** I thought that they took that out and
16 now alleged damages and argue under *Mercer* if it's nominal,
17 then we get attorneys' fees, but at least this is a toehold
18 into the damages world that *Cummings* really doesn't treat. I
19 know you say that --

20 **MS. SHERIDAN:** It doesn't treat it square on, but it
21 does indicate that you have to have economic damages.

22 **THE COURT:** Well, you have to have damage that would
23 lead to an award of nominal damages, right?

24 **MS. SHERIDAN:** I don't think that that's what
25 *Cummings* indicates.

1 **THE COURT:** Well, *Cummings* is about emotional
2 damages, right? I mean, you literally say in your reply that
3 it overrules *Mercer*. And I don't see it because it was about
4 emotional damages and *Mercer* was about if all you have is you
5 get the instruction on nominal damages and the jury agrees and
6 says there's nominal damages, then you can get attorneys'
7 fees. So I'm not sure --

8 **MS. SHERIDAN:** Okay, I don't read *Cummings* that way,
9 Your Honor. If I could shift --

10 **THE COURT:** How do you read it?

11 **MS. SHERIDAN:** Well, that basically Title IX is --
12 what you get in Title IX are contract-like damages which are
13 economic damages. And I don't think like in a breach of
14 contract, there's no entitlement to nominal damages. And it's
15 why, you know, it's why you don't get punitive damages either
16 under Title IX. These are damages that only would come up in
17 the context of a breach of contract. So that's how I read
18 *Cummings*.

19 **THE COURT:** So you're reading *Cummings* broadly to
20 say that it eliminates nominal damages?

21 **MS. SHERIDAN:** For Title IX cases, yes.

22 **THE COURT:** And that's based on --

23 **MS. SHERIDAN:** That's based on the construct that
24 you can only get the types of damages you could get in a
25 breach of contract action which are economic damages, they're

1 not nominal damages.

2 **THE COURT:** Okay.

3 **MS. SHERIDAN:** And so I'd like to shift gears again,
4 Your Honor.

5 **THE COURT:** Sure.

6 **MS. SHERIDAN:** And that is to the claims against the
7 individual defendants, Ms. Karmiol and Ms. Nastase. Because I
8 really do believe that given Your Honor has indicated it's a
9 murky area and it's a difficult area, that they're entitled to
10 qualified immunity under these particular facts, that there
11 was no clearly established right.

12 **THE COURT:** Except that's a defense, right? That's
13 an affirmative defense.

14 **MS. SHERIDAN:** But it's an affirmative defense that
15 should be decided at the earliest moment that the Court can.
16 And there's just nothing in *Feminist Majority* that puts them
17 on notice that this type of speech, speech made from one
18 individual to -- one group of students to another group of
19 students about the complainant that is not clearly related to
20 gender, is not clearly retaliatory, that that required them to
21 do anything other than what they did. And, you know --

22 **THE COURT:** So you're saying on the equal protection
23 claim they're entitled to qualified immunity even though
24 that's a slightly different -- I mean, yes, it involves --

25 **MS. SHERIDAN:** Yes. And --

1 **THE COURT:** -- a *Feminist Majority* theory, but also
2 on this case, this claim alleges there was one process for Ms.
3 Roe and one process for Mr. Doe. And if you -- if, if in the
4 end of the day I find that the process for Mr. Doe involved a
5 claim of sexual harassment that was known and not acted upon.

6 **MS. SHERIDAN:** Yeah, but you have to look at whether
7 Mr. Doe and Ms. Roe were similarly situated.

8 **THE COURT:** Okay.

9 **MS. SHERIDAN:** And Ms. Roe's complaint is something
10 that we can all agree clearly fell within Title IX. It was a
11 complaint of sexual assault.

12 **THE COURT:** I understand that.

13 **MS. SHERIDAN:** But his claim, it's one of defamation
14 essentially.

15 **THE COURT:** But until we get the facts on that,
16 right? So say it ends up being --

17 **MS. SHERIDAN:** But in terms of the facts that were
18 alleged. And --

19 **THE COURT:** I understand that. But again, if I'm
20 going to be careful on the sexual harassment piece, then I'm
21 going to be equally careful on equal protection. Because it
22 all -- you all said it in your pleadings, it largely rises and
23 falls on the same theory. And there are allegations pled that
24 there was one process for Ms. Doe and one process for Mr. Roe.
25 If you're right and the facts demonstrate that this is not

1 sexual harassment, this is defamation.

2 **MS. SHERIDAN:** But I don't see how they're similarly
3 situated.

4 **THE COURT:** But the point is the facts that are
5 going to be generated will answer that question. Plausibly,
6 plausibly Mr. Doe has averred that these comments were
7 directed, they were at least in part sex-based. Because "no
8 girl should have to" have her -- "wake up with her pants
9 undone." "I was raped by two boys." "I'm going to tell your
10 club that you are a rapist." "The Title IX office is going to
11 hear the complaints and direct accordingly" based off again,
12 the allegations that Ms. Roe was believed. That's how it
13 reads, most favorably to the plaintiff.

14 So if I can't find as a matter of law right now with
15 comfort that the claims are to be dismissed because they're
16 not sex-based, then how can I make the decision they're not
17 similarly situated? How can I do that if I don't answer the
18 first question?

19 **MS. SHERIDAN:** Because one type of complaint is
20 clearly sex-based. The other one is in a much -- I mean, if it
21 is at all. And I know that Your Honor is drawing all the
22 inferences in favor of the plaintiff as you're required to do,
23 but is in a much different category. So the fact that they
24 were treated differently, that one received a full process and
25 one was screened out has to do with the nature of the

1 complaints themselves and not with the gender of the
2 complainants.

3 **THE COURT:** But it wasn't just screened out. The
4 allegations are it was screened out because the persons in
5 authority in the Title IX office communicated after the case
6 was done that well, Ms. Roe complained of good faith. So in
7 other words, we can't do anything without --

8 **MS. SHERIDAN:** But I don't see how that's evidence
9 of discriminatory animus to say that the initial complaint was
10 made in good faith. I don't see in the context of --

11 **THE COURT:** When he's coming to say "She continues
12 to call me a rapist to the people who are now kicking me out
13 of a club that I belonged to for the last four years," that
14 context. Why is that a response that does not indicate a
15 disparate treatment? Like in other words, the plaintiff is
16 saying, draw from this, Judge, that there should have at least
17 been a conversation that was started off similarly to the
18 first one that we had which is, we'll talk to PSA. We'll tell
19 them to stop harassing you, right? Why did it devolve from
20 there? And then it was, but we're not going to protect your
21 identity and then we're not going to talk to them if we can't
22 tell them who you are. And then we take what Ms. Roe says in
23 good faith and that Roe took these actions not because she was
24 harassing and retaliating you, but because she believed you
25 raped her.

1 I mean again, why am I not at this stage giving the
2 benefit of the doubt to the plaintiff?

3 **MS. SHERIDAN:** Because these are difficult decisions
4 and the Title IX coordinator shouldn't be having to defend
5 individual claims against them for making difficult decisions
6 in gray areas. That's exactly what qualified immunity is
7 supposed to do.

8 **THE COURT:** And at least in the *Feminist Majority*
9 there is a platform for complaining about student-on-student
10 sexual harassment, so if this is sexual harassment --

11 **MS. SHERIDAN:** If, but that's the big if and that's
12 why it falls within qualified immunity. If the Court, if we
13 have to engage in discovery for the Court to make that
14 determination, I'm not sure how a Title IX officer could be on
15 notice that this was somehow discriminatory.

16 **THE COURT:** Well, my first question to you is -- one
17 of the questions, what policies do you have? What procedures
18 do you have? I can't get an answer on that. So yes, there
19 might be a little bit of discovery on that because I don't
20 know the answer. And that answer matters with regard to
21 knowledge and deliberate indifference. And frankly, I don't
22 see from a practical perspective if there's going to be
23 discovery on the facts, then it's going to overlap with both
24 claims because like the conversation we're having, right, it
25 rises and falls on at least what are the facts? And then how

1 close is it to being clearly established. It may not be
2 clearly established. You may win at the end of the day.

3 **MS. SHERIDAN:** Thank you, Your Honor. I understand
4 your position.

5 **THE COURT:** And so I'm clear when I talk to the
6 plaintiff, this is not an easy decision. This is actually a
7 decision, again, aimed at making sure when I finally put pen
8 to paper, that we've got enough to give both sides some
9 clarity and some certainty so that whoever appeals me, there
10 is a record by which the Court can really nail down these
11 important -- these are critical issues for the University. I
12 fully recognize that.

13 **MS. SHERIDAN:** Understood. And I have to say I was
14 somewhat constrained by the four corners of the complaint.

15 **THE COURT:** Right.

16 **MS. SHERIDAN:** I did debate whether to expand this
17 and make this more like -- or in the alternative, Summary
18 Judgment and so here we are.

19 **THE COURT:** And on that note, Ms. Sheridan -- I'll
20 speak to the plaintiffs about this in a moment. As you
21 probably already figured out, I'm largely inclined to deny the
22 motion, but for Count Five. There is no ex parte on here and
23 really, when you get up, just keep that in mind.

24 **MS. SHERIDAN:** Thank you, Your Honor. Yes.

25 **THE COURT:** Right, there's an alternative universe

1 in which the student is graduated, that dog is not going to
2 hunt. But what I am envisioning is that we would then talk
3 about in advance, perhaps in a recorded conference, what
4 discovery is going to look like. Because this is not going to
5 be, you know, a frolic for the plaintiffs and that needs to be
6 proportionate to the issues. What we have to deal with is
7 this case on these facts. I know it probably sounds to the
8 court reporter like I'm speaking in code, but I want to be
9 clear that I'm going to take an active role in discovery so
10 that it's not what I think the University is concerned about.
11 Am I getting that right, Ms. Sheridan?

12 **MS. SHERIDAN:** Yes. Thank you, Your Honor. We are
13 worried about extra burdens, for sure.

14 **THE COURT:** I can understand that.

15 **MS. SHERIDAN:** Thank you.

16 **THE COURT:** Okay. Mr. Bradley?

17 **MR. NORTH:** Thank you, Your Honor. Benjamin North.

18 **THE COURT:** North. You know, it's funny. I said it
19 and I was like, "That's not right." But I read it and it was
20 here. I didn't want to call you Benjamin, but Ms. Smith has
21 you as I guess Mr. and Mrs. Bradley. Mr. North, I'm sorry.

22 **MR. NORTH:** That's quite all right, Your Honor.
23 Just before I begin my argument, I just want to inform the
24 Court of a couple of things. The first is that I have a
25 stuttering disability, so it just might take me a bit longer

1 than my colleague on the other side to argue.

2 **THE COURT:** No problem.

3 **MR. NORTH:** The second thing is as you might be able
4 to tell, I have allergies or a bad cold or something so I'd
5 just ask the Court to bear with me on that front, as well.

6 **THE COURT:** I'm sorry. They're cleaning in the court
7 and it smells like bleach. So I'm sorry if it's aggravating
8 you. No worries, you take your time.

9 **MR. NORTH:** I can't really smell it anyway, so no
10 worries.

11 **THE COURT:** Okay.

12 **MR. NORTH:** But beginning with my argument, in the
13 interest of not taking up too much of the Court's time, I just
14 wanted to address what I consider to be a few key points in
15 this argument today.

16 The first is clarifying the pleadings standard under
17 Title IX considering *Sheppard*, *Twombly* and *Davis*; the second
18 is responding to the defendants' arguments that the harassment
19 here was not plausibly on the basis of sex which the Court has
20 shown an interest in during defendants' arguments; and the
21 third is whether the University here plausibly acted clearly
22 unreasonably in light of the known circumstances.

23 Of course if the Court would like me to address another
24 area, I'm happy to do that.

25 **THE COURT:** Well, do you agree that it largely rises

1 and falls, the harassment, the retaliation, although I think
2 that the University raises a good point. I'm not really sure
3 whether under any set of facts there could be retaliation
4 based on your client's participation in the Title IX process,
5 but at this stage I just, I can't. I can't say that as a
6 matter of law, right, there's nothing, there's no plausible
7 version of the facts in which he was not retaliated by Roe and
8 others because of that process and his defense of himself. But
9 it's a novel theory and in the end, I don't know if that's
10 going to prevail. I just need more facts.

11 But would you agree -- I guess the larger point is would
12 you agree that essentially it all comes down to whether the
13 facts make plausible that the harassment and retaliation is
14 sex-based?

15 **MR. NORTH:** I think that's right, Your Honor. And I
16 think the keyword there is "plausible." This kind of gets
17 into the first point I was hoping to cover, but the pleading
18 standard here ever since *Twombly/Iqbal* is that a complaint
19 must state the claim early and that it's plausible on its
20 face. It doesn't need to disprove, same context as Title IX,
21 other potential reasons for why the defendant acted the way
22 they did.

23 So for example, that the harassment was on the basis of
24 sex. What the pleading standard requires is the plaintiff to
25 allege facts sufficient to make it plausible that the

1 harassment was on the basis of sex. It does not require
2 plaintiffs to disprove other possible reasons for the
3 harassment.

4 So I would agree with Your Honor that at the pleading
5 stage, I think that the plaintiff has alleged facts sufficient
6 to show that sex was one plausible reason for the harassment.

7 **THE COURT:** And precisely in your complaint what
8 would you point to?

9 **MR. NORTH:** What I would point to -- and Your Honor
10 has already gone into this with the defendant, is that this is
11 an accusation of rape. It all comes down to -- it all relates
12 back to a sexual encounter. Of course sexual encounters have
13 to do with sex. That's the first thing I would say is that an
14 accusation of sexual misconduct is obviously on the basis of
15 sex.

16 The second thing I would say is that in the context of
17 what was going on on campus during this case, context being
18 that the underlying Title IX process had just resolved and
19 that immediately thereafter the complainant in that case and
20 defendants 2 and 3 engage -- and what I should say they're all
21 female -- against my client who is a male -- they all engage
22 in a concerted campaign to call him a rapist. And again, a
23 rapist, that's an act that has something to do with sex,
24 obviously. And I think in the context of -- in the context of
25 -- what an accusation of rape means I should say, I think it's

1 speech on the basis of sex in the same way that what some of
2 the cases we've cited are. And I know I said that very
3 sloppily, but let me kind of explain here.

4 Of course rape, the term "rapist" is a sex-mutual word.
5 Of course I concede that. But to take defendants' arguments to
6 limit the Title IX claim to only sex-specific language would
7 unduly constrain the purpose of Title IX and actually seems to
8 contradict some of the cases that they cited. For example,
9 *Feminist Majority Foundation* as defendants themselves argued
10 just a moment ago, *Feminist Majority Foundation* concerned
11 threats of physical and sexual violence which, of course,
12 threats of physical and sexual violence are not themselves
13 limited to only men and women. A man can be threatened by
14 rape, a woman can be threatened by rape. There's nothing about
15 that threat inherently just looking at the words that is
16 limited to one sex or another. But of course the act in the
17 threat does relate to sex. And that in the same way an
18 accusation of being a rapist relates to sex. So I think again,
19 it's just plausible that this is harassment on the basis of
20 sex. The Court does not need to find that it's not harassment
21 on the basis of some other factor, it just needs to find for
22 the moment as plausible.

23 **THE COURT:** In trying to really drill down on this
24 what does it mean to be on the basis of sex, I do think it's a
25 different context. But the high court has given some guidance

1 on this in *Bostock* dealing with that very question of how do
2 we define sex. And making it clear that your burden is not to
3 show, again, one -- that there's only one motive, but that it
4 is -- or not even a primary motive, but a motive on the basis
5 of sex. And I found that to be instructive because where some
6 of these other cases don't -- the real work is going to be to
7 define the contours here because the fact of the matter is
8 this is a person who is accused of rape who is now saying
9 they're the victim of sex-based harassment and that's just
10 taking this whole area of the law in a different direction.
11 Right? But when it was in the more traditional direction
12 which is a woman either being discriminated against because
13 she complained about rape or a woman saying -- the victim of
14 sex-based violent speech, it didn't require the same searching
15 analysis. Does that make sense?

16 **MR. NORTH:** Yes. I think there are a couple points
17 there, Your Honor. But the first -- but yes, to address I
18 guess your last point first, I do think that makes sense. I
19 definitely acknowledge we're in kind of a -- I wouldn't
20 necessarily say unique totally factual circumstance when it
21 comes to a deliberate indifference claim. And the reason I
22 say wouldn't totally consider it unique is because still here
23 we have a complainant complaining to the University and the
24 University chose to do nothing about the complaints. So in
25 that sense, of course --

1 **THE COURT:** But the University would say because
2 it's not Title IX actionable. I mean, that's why I wanted to
3 have the conversation with Ms. Sheridan about, well, you
4 didn't just do nothing. You did do something, but then you
5 chose to do nothing. In other words, why did the University
6 Title IX office get involved at all?

7 But to answer more their point and I know I am bouncing
8 around and I'm sorry, but my monkey brain just went to their
9 point which is what's the limiting principle? What's the
10 reason that this isn't going -- this case isn't going to open
11 up the floodgates for any accuser, accused rather, who is
12 exonerated to now say well, they're talking about me on
13 campus. Therefore Title IX, do something.

14 **MR. NORTH:** Yes. I think that's a great question
15 and I have a couple of responses for that. The first thing is
16 just to address I guess the plain language of Your Honor's
17 question, I don't think this would create a cause of action
18 for every exonerated student because not every case involves
19 allegations of rape outside of the Title IX process subsequent
20 to the resolution of the Title IX process. So that is to say
21 allegations made within the Title IX process are, of course,
22 we're not saying that those -- you know, that they should have
23 disciplined the complainant, let's say, for making the initial
24 report to Title IX. So anything within this underlying Title
25 IX process.

1 **THE COURT:** You're saying it's separate.

2 **MR. NORTH:** That's, of course, the first limiting
3 principle. The second limiting principle I would say is that,
4 you know, this is -- there was, in fact, some sex-specific
5 language here. It wasn't just calling John Doe a rapist, but
6 what it was also was, you know, this language about no girl
7 wants to wake up with her pants undone, two boys assaulted me.
8 Girl and boy are certainly sex-specific language. So I think
9 that given those two limiting principles, some explicitly
10 sex-specific language and two, this speech happened after the
11 resolution of the underlying Title IX case in which the
12 student was exonerated in which the school, in fact, formally
13 determined that there was no basis or to be specific I should
14 say that it was not more likely than not that he committed a
15 sexual offense. I kind of consider that exonerated, but I
16 would speak more carefully, I suppose.

17 So I think we have the favorable resolution to the
18 underlying Title IX process, the post-resolution speech
19 calling him a rapist that's outside the reporting mechanism of
20 the University, and then the explicit sex-specific language
21 that we have by female students. So I think all of those kind
22 of limit what is alleged to be a new cause of action here. I
23 consider it to be a relatively straightforward deliberate
24 indifference claim, but I do acknowledge that we're not
25 complaining of a sexual assault and then the University

1 doesn't do anything about it, we're complaining about
2 harassment, that is speech that the University doesn't do
3 anything about it. So if that answers Your Honor's question.

4 **THE COURT:** It does.

5 **MR. NORTH:** Okay. And just to go back to an earlier
6 question that Your Honor raised, I think that -- and this is
7 actually my first point that I had intended to bring up was
8 that *Twombly* and *Iqbal* maintain the plausibility standard for
9 all pleadings except for claims of mistake or fraud that are
10 subject to a heightened pleading standard.

11 And with respect to Title IX, the Fourth Circuit's recent
12 opinion in *Sheppard* I think is instructive in that *Sheppard*
13 held that Title IX bars all discrimination on the basis of sex
14 and education and that a plaintiff must plausibly allege but
15 for causation.

16 And as the Court hinted at, the Fourth Circuit cited the
17 Supreme Court's opinion in *Bostock v. Clayton County*, Court's
18 discussion of but for causation. And the Supreme Court in
19 that case explained that so long as the plaintiff's sex was
20 one but for cause in that decision, that's enough to trigger
21 the law. So I would say just to kind of brief full circle
22 perhaps that under *Sheppard's* reasoning and *Bostock* reasoning,
23 so long as sex was one but for cause of the harassment, that
24 would be enough at the pleading stage to survive a Motion to
25 Dismiss and I think we've done that.

1 So with that, I suppose I will turn to the last point I
2 was intending to address today because I believe I've
3 sufficiently covered the plausibility standard and whether the
4 conduct was plausibly sex-based. So the last point that I was
5 intending to cover was that defendants acted clearly and
6 reasonably in light of the known circumstances. And John Doe
7 alleged in the complaint that he repeatedly made all of the
8 harassment conduct known to defendants and pleaded with them
9 to do something and then, of course, they did nothing.

10 **THE COURT:** And if it's not sex-based, then all of
11 the claims fail, right? If it is then we go to the next
12 stage --

13 **MR. NORTH:** I think that is right, Your Honor.

14 **THE COURT:** --which is at least with regard to the
15 equal protection, was it clearly established.

16 **MR. NORTH:** I think that's right, Your Honor, yes.
17 I think there's really no argument the University can make
18 that if you assume it's sex-based harassment, there's really
19 no argument that they can make that they did anything about it
20 because they didn't do anything about it. They received
21 reports over and over again and they chose to do nothing, even
22 going so far as to state that the underlying report was made
23 in good faith or the accusations were made in good faith, even
24 though they formally determined that he was not responsible
25 for those allegations.

1 So for those reasons, I'd agree with Your Honor in that
2 the next question then would just be qualified immunity on the
3 equal protection claims. And there I would say that of course
4 qualified immunity is an affirmative defense. It can be
5 resolved and most often is resolved in Summary Judgment. And
6 I think that once the Court and the parties have had the
7 benefit of discovery, that that would be the more appropriate
8 place to resolve the question of qualified immunity. For
9 these purposes, *Feminist Majority* did clearly hold that a
10 university can be liable for student-on-student sexual
11 harassment and student-on-student retaliatory harassment. So
12 for the pleading stage, I think that's sufficient to survive
13 qualified immunity.

14 **THE COURT:** And I think the last question I would
15 have at this point unless what you're about to say sparks more
16 questions is what is exactly the plausibility of the
17 retaliatory harassment? How is it retaliation for
18 participation in the Title IX process rather than retaliation
19 for the outcome? I didn't even mean to set it up as an
20 either/or. Tell me why there's enough facts in the complaint
21 that it's retaliation based on the participation in the
22 process.

23 **MR. NORTH:** Well, I would say a couple things. The
24 first thing is that the harassment began very shortly after he
25 was -- his participation ended. So there's some sort of nexus

1 there between the fact that he's participating and then he is
2 subject to this harassment. So there's a temporal proximity
3 here. But then as Your Honor indicated during my colleague's
4 argument, there's also a subject matter proximity here in that
5 the retaliatory harassment covers the exact same subject
6 material as John Doe's defense of himself during the timeline
7 process and, of course, the underlying complaint thereto.

8 So I think that for those reasons and I'm sure there are
9 reasons that I've stated in my brief that I'm not recalling,
10 we would say that it's plausible. Again, it only has to be
11 one plausible explanation for the retaliatory -- for the
12 harassment. So for those reasons and the reasons stated in our
13 brief, defendants' motion should be denied. Thank you.

14 **THE COURT:** Thank you. Okay. So as I've indicated,
15 this is an extremely important case. It's very difficult to
16 call at the Motion to Dismiss stage. And that given that I
17 really do take very seriously the plausibility standard, ECF
18 52 is denied as to Count One which is the student-on-student
19 harassment claim for the reasons that we've discussed. And to
20 be clear, I'm just -- I'm not persuaded by *Nungesser*. I think
21 it's distinguishable in its facts. It's wrongly decided. 57,
22 I'm sorry, it's ECF 57. And to decide a case of that import I
23 think on a Motion to Dismiss standard is just not going to do
24 it, especially in light of I do find that the Fourth Circuit
25 standard in *Jennings* at least has been plausibly met here

1 given the allegations that we've discussed in totality. Not
2 just calling someone a rapist, but all the facts in the
3 complaint. I found *Rouse v. Duke University* and *Doe v. East*
4 *Haven* instructive and I guess one could say I'm pressing on my
5 own questions as to why those cases were so easily decided
6 when the woman was a complainant and why we struggle so much
7 when it's the man who is the complainant with similar
8 allegations in terms of making an allegation of rape and then
9 having much adverse speech directed at the plaintiff in *Rouse*
10 or in *Doe*. And it was in *Doe*, in fact, very easy for the case
11 to be concluded through a trial. And for the Second Circuit
12 to say it's certainly a reasonable juror could have found that
13 those responses to her allegation of rape were sex-based and
14 yet we struggle here with that. And I just need more facts to
15 understand why it's different from the University's
16 perspective.

17 So I'm going to deny dismissal of Count One on the
18 question of whether this was sex-based harassment. It's
19 plausible given all the facts in the complaint.

20 Similarly, with regard to whether the harassment was
21 severe and pervasive, under the prevailing standard, being
22 barred from -- or being denied access to a program or
23 activity, being excluded from a program or activity is
24 sufficiently severe and pervasive. That's been alleged here
25 and so I don't see any grounds to say that there's no set of

1 facts given in the light most favorable to the plaintiff that
2 would otherwise not meet that element. So I deny the motion on
3 that ground.

4 No facts to support deliberate indifference: Again, for
5 the reasons we've discussed, it largely rises and falls on
6 whether the conduct at issue is on the basis of sex. I think
7 for the reasons we've discussed I can't determine that it's
8 not. And under the plausibility standard, there are enough
9 facts to suggest in the light most favorable to Mr. Doe that
10 it is. And so deliberate indifference, clearly the remaining
11 facts are that the Title IX office knew, they knew
12 specifically what the complaints were. They took certain
13 action, but not sufficient action certainly under *Feminist*
14 *Majority*. And so for that reason, when the plaintiff alleges
15 reaching out to the office on at least four occasions over the
16 course of several months, filing two formal complaints, being
17 told we will take certain action and then that is not taken
18 under the facts that have been alleged, that is sufficient to
19 constitute at this point deliberate indifference.

20 With regard to the retaliation claim, Count Two, for
21 largely the same reasons I'm going to allow it to go forward.
22 I do query whether it's going to be -- this is a different
23 case than *Feminist Majority* and the claimed participation in
24 the protected activity is different. But again, staying
25 faithful to the *Iqbal/Twombly* standard, I think that there is

1 enough plausibly pled that this is retaliatory harassment
2 because of Mr. Doe's participation in the Title IX proceeding,
3 the results, and the fallout. We'll see where we end up after
4 Summary Judgment.

5 On the damages point, I have to say that I don't see
6 *Cummings* as wiping out *Mercer*. And when I read the complaint
7 it claims damages. It doesn't -- it actually under the prayer
8 for relief, notes that they are claiming compensatory,
9 special, and punitive damages. I don't believe there's any --
10 I'm not sure -- Title IX doesn't allow for punitive damages,
11 but there are defamation claims and that's not been really
12 addressed. But as to damages, there have been actual damages
13 pled. And so I don't see *Cummings* as just wiping the slate
14 clean. Perhaps it reaches emotional damages. And your point,
15 Ms. Sheridan, about it being contract-based claims may be, but
16 that doesn't in my view negate that under *Mercer*, Title IX
17 litigants may be entitled to nominal damages and the
18 attorneys' fees that flow. So certainly you can take another
19 shot at convincing me otherwise, but on these pleadings I
20 don't see it.

21 Okay, with regard to equal protection, Count Four,
22 similarly and in the individual capacities at this juncture
23 I'm going to deny it for largely the same reasons. I think the
24 different new argument that the defendants press is that it is
25 not clearly established that the constitutional or statutory

1 right at issue is simply not clearly established. And that may
2 be the winning argument after discovery, but qualified
3 immunity is a fact-bound defense. Certainly the defendant is
4 right. I must decide it at the earliest possible moment and
5 I'm saying I can't decide it at this juncture, but that
6 doesn't mean I won't after the facts are more clearly laid
7 out.

8 And so given where we are in the procedural posture is
9 largely the reason why I cannot say Count Four is barred for
10 the personal capacity claims by qualified immunity. It may be
11 in the end.

12 With respect to Count Five, the equal protection claim in
13 Karmioli and Nastase's official capacities, I'm going to grant
14 dismissal on that. I don't see any facts that trigger *ex parte*
15 *Young* and otherwise as agents of the state the defendants are
16 entitled to Eleventh Amendment immunity to be protected from a
17 suit in this court. So Count Five is dismissed and is
18 dismissed with prejudice.

19 Any questions with regard to the ruling at this point?
20 We'll talk about next steps.

21 **MS. SHERIDAN:** No thank you, Your Honor.

22 **THE COURT:** All right. With regard to ECF 58 which
23 is Defendant 2's Motion for Summary Judgment.

24 **MR. CONDLIFF:** Good afternoon, Your Honor. Jack
25 Condliff for the Defendant 2 in this matter. I'm going to be

1 incredibly brief. I really don't have a lot to say about
2 this. I did note the criticism of my motion about not having
3 cited the cases in Summary Judgment. Quite correct, I just
4 wasn't thinking about it at the time. I apologize to the
5 Court.

6 I will also say I'm familiar with the cases cited by the
7 plaintiffs about early Summary Judgment and the right to take
8 discovery. I've been a plaintiff's attorney for 31 years. I
9 know those cases by heart so I'm not going to dispute that
10 fact, but the reason I filed this motion is a very simple one
11 which is that Defendant 2 is the wrong person. They sued the
12 wrong person. She wasn't there. She wasn't at any of the
13 meetings. And as her affidavit states, she simply wasn't
14 involved in what is being complained of here.

15 **THE COURT:** I thought that there was a response with
16 respect to online participation. And that the complaint does
17 not squarely state that this was only in person advocacy. As
18 a matter of fact, social media was used and is often used. So
19 why at this very early stage would I say in the light most
20 favorable to the nonmoving party, clearly Defendant 2 could
21 not have participated in the alleged events?

22 **MR. CONDLIFF:** Well, I didn't see any allegations
23 that Defendant 2 made online posts. There were online posts --

24 **THE COURT:** There were online meetings where she was
25 -- wasn't there? I thought I read an affidavit that was

1 submitted by plaintiff with respect -- am I wrong about that?
2 With respect to an online meeting.

3 **MR. CONDLIFF:** Let me go back to that, Your Honor. I
4 have to reread -- I have it right here, at least I thought I
5 did. That's the problem with being paperless, Your Honor, is
6 you don't always --

7 **THE COURT:** I mean, why isn't this -- really, we're
8 not -- we've had no discovery. You're right, it's going to be
9 resolved with a handful of interrogatories and maybe a short
10 deposition.

11 **MR. CONDLIFF:** I understand. I'm just concerned
12 about my client's time and being involved in this. She has
13 graduated. She has a job at the United Nations NGO and I'm
14 trying to get her out of the middle of dodge. I mean, this --
15 Defendant 3 categorically denies the substance of the
16 allegations, but she's not denying that they sued the person
17 they think they were supposed to sue. Defendant 2 is saying,
18 you just got the wrong person. You should not have sued me in
19 this matter.

20 I agree it may be short discovery, but short discovery to
21 a layperson and short discovery to a lawyer are two vastly
22 different things and it is intrinsic. So that is my concern.
23 That's why I filed this so early. I mean, I knew the Court
24 might reject it, but I wanted to make the point early on that
25 with Defendant 2, she shouldn't be in this case at all.

1 **THE COURT:** And it's not that Defendant 2 wasn't in
2 leadership in the PSA.

3 **MR. CONDLIFF:** She absolutely was, but she wasn't
4 there.

5 **THE COURT:** You're saying she was not on campus and
6 therefore not involved in the chain of events?

7 **MR. CONDLIFF:** She was at home, ill, getting taken
8 care of. You've got the affidavit there in front of you and I
9 don't want to discuss the cause here on the public record, but
10 yeah, she was not doing well. She was instructed by her doctor
11 not to return to campus, that it was okay to do online
12 learning. And for these events she was not the person
13 participating or exercising her leadership role.

14 **THE COURT:** Okay, all right. I get the argument.
15 Let me see what the plaintiff has to say about it.

16 Mr. North, we're told Defendant 2, wrong person.

17 **MR. NORTH:** Yes, and I appreciate opposing counsel's
18 candor and his argument. I guess my brief response would be we
19 don't know that she wasn't involved. I mean, she says she
20 wasn't involved through her affidavit. We have in our
21 affidavit and I think on page 6 of our opposition brief at
22 least a link to one PSA meeting in which she was present and
23 she spoke.

24 **THE COURT:** And it was online, right? Am I right
25 about that? Wasn't it online?

1 **MR. NORTH:** I reviewed the video this morning. The
2 hyperlink is in footnote 4 on page 6. But I reviewed it this
3 morning and she was physically in person. Now I don't know if
4 that room was on campus or what, but she was sitting there in
5 person with a group of what looked to be students. Again, I
6 don't know beyond that, but it was a PSA meeting from what it
7 seemed. So, you know, it's not appropriate of course for a
8 defendant to just say hey, I wasn't involved and short-circuit
9 litigation. It looks like at least from our investigation and
10 from this video that she was there, she was involved and for
11 those reasons, Summary Judgment is inappropriate.

12 **THE COURT:** Yeah, okay. Well I agree. I'm going to
13 deny it at this juncture. Again, I'll say the same thing. I'm
14 not interested in Mr. Condliff making anyone go through a
15 protracted, expensive, and unnecessary discovery battle. So
16 I'm going to keep it tight and if the defense is going to be
17 "not me," let's get to the discovery that resolves that
18 quickly.

19 **MR. CONDLIFF:** I don't think it's expensive for my
20 client. I'm pro bono, but--

21 **THE COURT:** Well, for you and I appreciate your
22 services in that regard. But at this juncture pre-discovery
23 where there's been sufficient showing on the plaintiff's part
24 that it would be inappropriate to grant Summary Judgment at
25 this juncture without additional discovery because there's at

1 least some facts to suggest Defendant 2 was involved in PSA
2 during the relevant times, I'll deny the motion.

3 **MR. CONDLIFF:** Thank you, Your Honor.

4 **THE COURT:** Okay, Counsel, let's talk next steps.
5 Customarily what I would do is issue just a generic scheduling
6 order and then have you all discuss and file in response that
7 the milestone date A) joint status report. I suggest we do
8 that but then the next -- what you file in response in that
9 joint status report I urge you to make it a little bit more
10 detailed and surgical with respect to what discovery you
11 intend to exchange so that I can have a more meaningful
12 conversation with you all. If there's going to be concern
13 that it is far afield, it's not dealing with the issues that
14 are squarely concerning the Court in the next stage, that we
15 have that conversation and I'll have the follow-up, what I
16 call the Rule 16 conference. We'll do it recorded because I
17 would anticipate that if all is well and you say "We're all
18 working well, we're keeping it proportionate and we're in
19 agreement on that," well it will be a really quick
20 conversation and we're done. If there's any concern about it
21 then we're having a hearing on the record so we can
22 memorialize it and go forward. So if there are any discovery
23 disputes, we know where we started. I handle all my discovery
24 disputes so we'll have on the record my letter order regarding
25 discovery which basically tries to streamline the issues.

1 If at any point you encounter a discovery dispute that
2 cannot be resolved by way of meet and confer, put it in a
3 letter to me and I'll get you all on the line within a week or
4 so of that letter to resolve it in a recorded status and if
5 necessary, I'll bring you all in and we see each other in
6 person. I don't like to do that because it's expensive and
7 time consuming for you all, but it's available.

8 So that is my proposed next step. I'll pump that out --
9 well, we need a date by which you'll answer the complaint
10 defendants and then I will issue a scheduling order.

11 Do you all need more time than 14 days that would
12 otherwise be allotted, defendants?

13 **MS. SHERIDAN:** If we could have -- next week is
14 actually spring break. If we could have an extra week that
15 would be great.

16 **THE COURT:** So it would be 21 days. Plaintiff, any
17 issue with that?

18 **MR. NORTH:** No objection, Your Honor.

19 **THE COURT:** Okay, so the answer will be due 21 days
20 from today. Once we get that we'll pump out a scheduling
21 order. There will be a date by which you'll file with me the
22 joint status report. The dates that are merely suggestions,
23 I'll say that in terms of the schedule, I expect that you all
24 will work together to come up with milestone dates that work
25 collectively for the case. If you put those in the joint

1 status report to me and they're reasonable, I'm not going to
2 stand in the way of peace. I will make that the operative
3 scheduling order and then we'll make sure that we're all on
4 the same page with regards to discovery. Sounds good?

5 **MS. SHERIDAN:** Thank you.

6 **MR. NORTH:** Yes, Your Honor. Thank you.

7 **THE COURT:** All right, thank you all. I really
8 appreciate your time. Take care.

9 **(Proceeding concluded at 2:24 p.m.)**

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